Office - Supreme Court, U.S.
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DEC 27 1982
ALEXANDER L. STEVAS,
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-897

JANE DOE, JOHN DOE, and MARY ROE, JANE X., JOHN X., JANE Y., JOHN Y., JANE Z., and JOHN Z., Pseudonyms for actual persons,

Petitioners,

v

FRANK J. KELLEY, Attorney General for the State of Michigan and WILLIAM L. CAHALAN, Wayne County Prosecutor,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT KELLEY, ATTORNEY GENERAL, IN OPPOSITION

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PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1982

QUESTION PRESENTED FOR REVIEW

I.

MAY THE STATE OF MICHIGAN CONSTITUTIONALLY PROHIBIT ADOPTION OF A CHILD-TO-BE-CONCEIVED THROUGH A PURCHASE OR SALE AGREEMENT WHEREIN THE ACTUAL MOTHER RECEIVES CONSIDERATION FOR HER PROMISE TO CONCEIVE BY ARTIFICIAL INSEMINATION, BEAR, AND DELIVER TO THE OFFERORS SUCH CHILD?

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FRANK J. KELLEY, Attorney General for the State of Michigan and WILLIAM L. CAHALAN, Wayne County Prosecutor,

Respondents.

OPINIONS BELOW

The Opinion of the Circuit Court for the County of Wayne, Michigan, granting Respondents' Motion for Summary Judgment and dismissing Petitioners' Complaint for Declaratory Relief, was entered January 28, 1980 (Petitioners' App at 12a-36a). The Circuit Court's decision was affirmed by written opinion of the Michigan Court of Appeals on May 5, 1981, and is reported at 106 Mich App 169; 307 NW2d 438 (2a-11a). On August 10, 1982, the highest court of the state, the Michigan Supreme Court, denied Petitioners' Application for Leave to Appeal the decision of the Michigan Court of Appeals. See 414 Mich 875 (1a).

While Petitioners have exhausted their state court appeals, the decision of the state court being reviewed by certiorari is that of the Michigan Court of Appeals. The Michigan Supreme Court has held (*Frishett* v *State Farm Mutual Automobile Insurance Co*, 378 Mich 732, 733 (1966)) that where

it enters an order denying leave to appeal, such action "'imports no expression of opinion upon the merits of the case'", citing this Court's decision in *United States* v *Carver*, 260 US 482, 490 (1923) with respect to the effect of denial of a writ of certiorari by this Court.

Accordingly, the instant petition for a writ of certiorari should properly be treated as being directed to the Court of Appeals for the State of Michigan. See *Callender* v *Florida*, 383 US 270 (1966).

JURISDICTION

Respondent is not satisfied with Petitioners' presentation, for the reason that Respondent believes that this "substitute" petition, filed on or about December 1, 1982, and back-dated by the Clerk for docketing as of November 8, 1982, is not a "new and proper" copy "promptly substituted" under Rule 33.7. Accordingly, as further set forth as the first argument in "Reasons for Denying The Writ", Respondent believes the instant petition is not timely for purposes of this Court's jurisdiction under Rule 20.2 and 28 USC § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent is satisfied with Petitioners' presentation, with the following two exceptions: Michigan Compiled Laws Annotated § 710.54 (1) (b); MSA 27.3178(555.54) (1) (b) is not fully set forth at page 3 of the petition. The complete statutory provision, with the language omitted by Petitioners underlined, reads:

> "(b) The registration, recording, or communication of the existence of a *child available for adoption or the existence of a* person interested in adopting a child."

Secondly, the petition (at pp 4-5) does not quote the third (and final) sub-section of Michigan Compiled Laws Annotated § 710.54; MSA 27.3178(555.54) (3) which states:

> "(3) To assure compliance with limitations imposed by this section, by section 14 of Act No. 116 of the Public Acts of 1973, being section 722.124 of the Michigan Compiled Laws, and by section 4 of Act No. 263 of the Public Acts of 1913, as amended, being section 331.404 of the Michigan Compiled Laws, the court may require sworn testimony from persons who were involved in any way in informing, notifying, exchanging information, identifying, locating, assisting, or in any other way participating in the contracts or arrangements which, directly or indirectly, led to placement of the person for adoption."

COUNTERSTATEMENT OF THE CASE

On May 15, 1978, Petitioners Jane and John Doe, husband and wife, and Mary Roe, pseudonyms for actual persons, filed a complaint for declaratory action in the Circuit Court for the County of Wayne, Michigan. The Petitioners sought a declaration that certain provisions of Michigan Compiled Laws §§ 710.54 and 710.69; MSA 27.3178(555.54) and (555.69) are unconstitutional. The challenged provisions prohibit the exchange of money or other consideration in connection with adoption and related proceedings (App at 2a, 14a-16a). The Michigan Court of Appeals in its opinion quoted from the Petitioners' complaint for declaratory action:

> "'(a) That JANE DOE and JOHN DOE will pay MARY ROE a sum of money in consideration for her promise to bear and deliver JOHN DOE's child by means of artificial insemination.

"'(b) That a licensed physician will conduct the artificial insemination process.

"'(c) That prior to the delivery of said child, JOHN DOE will file a notice of intent to claim paternity.

"'(d) That at the time the child is born, JOHN DOE will formally acknowledge the paternity of said child.

"'(e) That MARY ROE will acknowledge that JOHN DOE is the father of said child.

"'(f) That MARY ROE will consent to the adoption of said child by JOHN DOE and JANE DOE'.

"The agreement also provided that plaintiffs would pay to Mary Roe the sum of $5,000 plus medical expenses. In addition, Mary Roe would be covered by sick leave, pregnancy disability insurance, and medical insurance from her employment while she is off work having the child and recuperating from the delivery."
(App at 4a-5a).

During discovery proceedings in the trial court, Petitioners Jane and John Doe acknowledged that they were married in 1965, and were the parents of two sons (App at 3a-4a); the record does not disclose whether the children were of the marital union, or adopted. Petitioners further alleged that Jane Doe had undergone a tubal ligation so that she was biologically incapable of bearing children (App at 4a and 13a). The Does proposed to have Petitioner Mary Roe, a secretary employed by Mr. Doe, conceive a child by physician-administered implantation of Mr. Doe's sperm (artificial insemination).

The trial judge characterized Petitioners' constitutional challenge as being two-pronged: first, urging that Michigan Compiled Laws Annotated 710.54; MSA 27.3178(555.54) is void for vagueness, and that the Petitioners' proposed arrangement falls within the constitutional ambit of the "right of privacy." (App at 16a-17a). The trial court rejected the vagueness challenge (App at 17a-21a). Next, the trial court held that the right which the Petitioners sought to assert is not within the realm of the constitutional guaranty of privacy, stating:

> "The right to adopt a child based upon the payment of $5,000 is not a fundamental personal right and reasonable regulations controlling adoption proceedings that prohibit the exchange of money (other than charges and fees approved by the Court) are not constitutionally infirm." (App at 24a).

Next, the trial court assumed for the sake of argument that the fundamental right of privacy is affected by the statutes, and reviewed their operation under the "compelling state interest" test set forth in *Roe* v *Wade*, 410 US 113, 156 (1973) (App at 26a). The trial court stated that the statutes satisfy the two elements of the *Roe* v *Wade* test. First, the "compelling state interest test" is met by the state's interest in prohibiting "baby bartering" under the statute (App at 27a) and by preventing "a money market for the adoption of babies." (App at 30a). Secondly, the court stated that the statute was drawn in a sufficiently narrow manner "preventing compensation as consideration involving an adoption proceeding" (App at 34a) and "[t]he statute is clear in expressing the public policy of this State that *all* persons involved in offering, giving or receiving anything of value in connection with an adoption are controlled by the statutes proscriptions." (App at 35a). In so stating, the trial court re-

jected Petitioners' claim that their proposed contract is not within the statutory proscriptions, opining "[t]he fact that this is not a contract among strangers, or that one of the adoptive parents would also be a natural parent, does not alter the fact that the action prohibited interjects compensation in an adoption proceeding . . ." (App at 34a-35a). Accordingly, the trial court granted Respondents' Motion for Summary Judgment (App at 35a-36a) and entered its order dismissing Petitioners' action on February 19, 1980.

The Michigan Court of Appeals affirmed on May 5, 1981 at 106 Mich App 169 (App at 2a-11a). The Court of Appeals squarely addressed, and rejected, Petitioners' contention that the statutes "impermissibly infringe[d] upon their constitutional right to privacy." (App at 5a). After discussing numerous decisions of this Court involving the right of privacy, the Michigan Court of Appeals held:

> "While the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy, see *Maher* v *Roe*, 432 US 464; 97 S Ct 2376; 53 L Ed 2d 484 (1977), we do not view this right as a valid prohibition to state interference in the plaintiffs' contractual arrangement. The statute in question does not directly prohibit John Doe and Mary Roe from having the child as planned. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures. In effect, the plaintiffs' contractual agreement discloses a desire to use the adoption code to change the legal status of the child—*i.e.*, its right to support, intestate succession, etc. We do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.
>
> "The plaintiffs also allege that the state has no compelling interest sufficient to justify the prohibitions em-

bodied in the disputed statutes and, in addition, that the provisions are drawn too wide to reflect any legitimate state interests in this area. Our disposition of the foregoing issue, however, renders consideration of this issue unnecessary.

"Affirmed." (App at 7a-8a).

Thereafter, Petitioners filed a timely application for leave to appeal with the Michigan Supreme Court, requesting the Court to invoke its discretionary review of the Court of Appeals decision. The Michigan Supreme Court denied leave to appeal on August 10, 1982; 414 Mich 875 (App at 1a).

REASONS FOR DENYING THE WRIT

I.

THE INSTANT "SUBSTITUTE" PETITION FILED PURSUANT TO RULE 33.7 IS NOT A "NEW AND PROPER" COPY OF THE PRIOR, NON-CONFORMING PETITION FILED NOVEMBER 8, 1982, AND THUS THE PRESENT PETITION IS UNTIMELY FOR PURPOSES OF THIS COURT'S JURISDICTION UNDER RULE 20.2 AND 28 USC § 2101(c).

On August 10, 1982, the Michigan Supreme Court denied Petitioners' application for leave to appeal the adverse decision of the Michigan Court of Appeals. On or about November 8, 1982, and within the 90-day period for invoking this Court's certiorari jurisdiction under 28 USC § 1257(3), Rule 20.2 and 28 USC § 2101(c), Petitioners filed with the Supreme Court Clerk their printed petition dated November 3, 1982. A copy of the petition was received by Respondent Kelley on November 9, 1982, and work began on preparing the brief in opposi-

tion for filing within 30 days, pursuant to Rule 22. On November 29, 1982, Respondent Kelley sent his brief to the printer. Three days later, on December 2, 1982, Mr. Keane, co-counsel for Petitioners, served three copies of the printed petition upon state court counsel for Respondent. That counsel mailed the three printed petitions to Respondent's counsel who is preparing the response in opposition in this Court; the petitions were received on December 7, 1982, after final changes in Respondent Kelley's brief had been approved. On that same day, Respondent's federal counsel discovered, after reviewing a copy of the petition received on December 2, that the petition differed in material respects from the initial petition received on November 9, 1982. The printer was immediately contacted, ordered to stop final printing of Respondent Kelley's brief which had commenced earlier, and instructed to return the proof brief.

Respondent's counsel then contacted the Clerk of this Court, who advised that the initial petition had been returned to Petitioners' counsel under Rule 33.7 because of certain defects. The second set of printed briefs had been received on December 1 or 2 and had been back-dated for docketing purposes under Rule 33.7 to November 8, 1982. Respondent's counsel was advised his brief was due 30 days after receipt of the substitute petition.

Supreme Court Rule 33.7 provides:

> "The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: *the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted.* If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions

> including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument." [Emphasis added.]

In commenting on Rule 33, Professor Moore states that

> ". . . judicial administration gains more from the formal ground rules than it loses." 13 Moore's Federal Practice and Procedure, SC33-7, ¶ 833.01[3].

Specifically referring to Rule 33.7, *supra*, Professor Moore concludes:

> "If form is to play any role in the processing of cases before the Court[1] [omitted] (and it does), then there must be sanctions to coerce compliance, for without sanctions compliance would be largely limited to the conscientous and careful practitioners. And while we believe these would constitute most of the Supreme Court bar, a small number would indulge in unnecessary deviations from prescribed methods and forms. That seems to be the premise underlying paragraph .7 of R 33." 13 Moore's, *supra*, SC33-20, ¶ 833.09.

The printed petitions filed with the Clerk on December 1 or 2 appear to go much further than merely "cleaning up" deficiencies in the format and appendix, consistent with Rule 33.7.

The instant petition is a substantial revision of the initial petition in the following illustrative respects. Two questions are now presented, as opposed to four questions in the initial petition. In the table of citations, one case previously cited is now omitted, and several non-Michigan statutes are now cited. As to constitutional provisions at issue, the First Amendment is

no longer cited. In the appendix portion, the pagination of the appendix differs from that of the initial petition (due to typesetting). The Order of the Wayne County Circuit Court, which appeared as appendix 26-27 in the initial petition, is now omitted from the appendix. Pages 41a-43a of the instant petition cite provisions of several non-Michigan statutes, which did not appear in the initial petition's appendix. With respect to the portion captioned Opinions Below, the instant petition has added as new language the last sentence thereof. The Statement of the Case portion is different, with rephrasing of language, addition of new language and omission of language cited in the initial petition.

Thus, it should be apparent that the instant petition represents something much more than bringing certain formal defects in the initial petition into compliance with Rule 33. In many respects it constitutes submission of a new petition, and not a mere "substitution" for a non-complying petition which relates back for purposes of docketing under Rule 33.7.

Therefore, the Court, in the exercise of its discretion under the second sentence of Rule 33.7, should deny the instant petition for the reason that it does not "relate back" to the date of the initial but defective filing, and, thus, is out of time under Rule 20.2 and 28 USC § 2101(c). Further, should the Court deny the writ for the reasons set forth in this argument, or for the reasons set forth in the arguments which follow, it is requested that the Court impose upon Petitioners those additional expenses which have been incurred by Respondent Kelley (and presumably by Respondent Cahalan) in recalling and revising the final proof copy of their briefs in opposition (to the initial petition) so as to adequately respond to the changes required to be made in response to the instant petition.

II.

THE ACTIONS PROPOSED BY THE DOES AND MARY ROE OF PURCHASING AND SELLING AN ADOPTION CONSENT MAY BE PROHIBITED BY THE STATE OF MICHIGAN.

Petitioner Doe's privacy claim is based on the argument that the proposed contractual arrangement is their individual prerogative, free of any State interference, to bear and beget children and to have and raise a family.[1] On various occasions, as noted by the Michigan courts in this case, this Court has stated that the having of children and the raising of a family are fundamental personal rights. *E.g., Griswold* v *Connecticut*, 381 US 479 (1965); *Carey* v *Population Services Int'l*, 431 US 678 (1977); *Maher* v *Roe*, 432 US 464 (1977).

However, an examination of the proposed transaction discloses that Petitioners seek to engage in other activities which go far afield from the having of one's own children and the raising of one's own family. To briefly review what each of the Petitioners desire:

(1) *John Doe, husband of Jane Doe*:

> He wants to deliver his semen to a doctor, who will then implant the semen in Mary Roe ("artificial insemination"). He wants to pay Mary Roe $5,000 for an adoption consent severing all legal ties to the child.

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[1] The Does have 2 children, although the record is not clear whether they were born of the marital union or were adopted. See Michigan Court of Appeals Opinion, App at 3a-4a.

(2) *Jane Doe, wife of John Doe*:

> She also want to pay Mary Roe to give up her child by adoption.

(3) *Mary Roe, secretary to Mr. Doe*:

> She wants to be paid by the Does for her agreement to consent to their adoption of her yet unborn natural child before the child is conceived. Mary Roe would retain rights to visit her child at the Does' both before and after the adoption by the Does (see Revised Answers to Respondent Attorney General's Trial Court Interrogatories, No. 11(q) (4) and No. 11(r), at p 4).

Petitioners argue that in matters of marriage, sexual intimacy, and family life, a constitutional right of privacy or "personal autonomy" should permit them to be "let alone" to do as they wish without any interference by the State. In fact, however, Petitioners are not complaining of interference by the State. Rather, Petitioners seek the intervention of the Michigan Probate Court into their relationships—to legitimize the natural child of John Doe and Mary Roe, to declare that this child is adopted by the Does, and to sever Mary Roe's legal ties as the natural mother. The Michigan adoption process with its applicable rules (including the prohibition against payment of consideration set forth in MCLA 710.54; MSA 27.3178(555.54)) in no way involves uninvited state interference in areas of sexual intimacy or family life in which there is a legitimate expectation of State non-involvement.

There is no fundamental right either to adopt or to specify the terms of adoption of one's child. State adoption laws provide an orderly mechanism for the care and protection

of children and their natural parents in those cases where the natural parents are unable or unwilling to assume the parental obligations and privileges of caring for and raising one's children. These laws are a proper exercise of the State's police power for health, safety, and the general welfare. The constitutional standard for laws enacted in the exercise of the police power has been summarized as follows:

> "'To justify a State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'" *Goldblatt* v *Hempstead*, 369 US 590, 594-595 (1962).

As noted in *New York ex rel Silz* v *Hesterberg*, 211 US 31, 39 (1908), subject to constitutional limitations, a state legislature is authorized to pass measures for the protection of people in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.

The following purposes, interests, and goals are served by Michigan's statutory prohibition of payments to the natural mother in connection with her consent to an adoption; and these public purposes are applicable to the transaction proposed by the Petitioners as well:

(1) Prohibition against a commercial market for babies —whether involving an unwed mother facing the agonizing decision of retaining or surrendering her child, a woman arranging to conceive a child anticipating a sale of that child or in performance of an agreement to conceive a child, or as a result of a contract for her participation in an extra-marital union to bear the proposed adoptive father's child.

(2) The best interests of the child.

a. natural parents should decide what is best for the child, with adoption as an option of last resort, without being influenced or coerced by offers of money.

b. avoidance of any economic incentive or reward for giving up a child for adoption.

c. avoidance of possibly traumatic discovery by the child of being separated from his or her mother through adoption under the terms of a monetary arrangement agreed upon before conception.

(3) Recognition of the inestimable, intrinsic worth of each person.

(4) Protection of family and marriage relationships from disruption through the wife and/or mother becoming involved in conceiving and bearing a child for some adoptive father in a monetary arrangement, or in anticipation of a commercial market for adoption.

(5) Avoidance of conflicting claims of parental rights and custody.

a. natural mother might renegotiate the fee by withholding consent to adoption, or resist if the probate court reduces the fee to be paid to her.

b. natural mother might resist adoption either before or after it is ordered out of guilt or out of the strong bond which quickly develops between mother and child.

c. conflict and uncertainty of those caring for the child over the status of the child would be detrimental to the child's development.

The detailed statutory system of having court approval of payments to the natural mother permits the payment of reasonable hospital and medical expenses connected with the birth of the child, as noted by Probate Judge Lincoln in his advisory memorandum of March 2, 1977 concerning these matters (App at 37a-40a). At the same time, MCLA 710.54(2); MSA 27.3178(555.54) (2) authorizes the probate judge to disapprove any payment to the mother which would improperly influence her or make the child an object of commerce. Such statutory regulation is neither oppressive nor arbitrary, and it has been correctly declared to be constitutional by the lower courts in this case.

Petitioners also argue that while the Michigan adoption code prohibitions "are gender-neutral on their face" (page 16 of Petition for Certiorari), the prohibitions have a disproportionate impact on Petitioner Roe and other women who want to surrender their children to adoption for a stipulated fee. Petitioners attempt to base this argument (not presented in the trial court or in the Court of Appeals, and raised for the first time in their Application for Leave in the Michigan Supreme Court[2] on cursory speculation as to the prevalence and legality of the sale of sperm to sperm banks which then disseminate it to physicians for artificial insemination. However, Petitioner Roe, as the proposed natural mother in the

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[2]

Accordingly, this issue (Petitioners' *Questions Presented* No. 2 (p i) and No. 4 of *Reasons for Granting Writ* (pp 15-17) does not properly arise from the record before the trial court and the decision of the Michigan Court of Appeals. *E.g., Tyrrel* v *District of Columbia,* 243 US 1 (1916).

transaction described by Petitioners, is not seeking to sell ovum to an "ovum bank"; rather, she is seeking to conceive and bear a child and then turn over that child of hers for adoption by others for a negotiated fee. Accordingly, this argument of Petitioners as to gender discrimination should be rejected as being without merit.

III.

THE PROHIBITION AGAINST PAYING A NATURAL MOTHER FOR CONSENTING TO THE ADOPTION OF HER CHILD IS SUFFICIENTLY NARROW IN ITS SCOPE.

Even if Petitioners are correct (which is not conceded) in asserting that the proposed transaction involves fundamental rights[3], the applicable constitutional test as set forth in *Zablocki* v *Redhail*, 434 US 374, 388 (1978) involving the right to marry would be satisfied:

> "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

The Michigan Adoption Code does not interfere with the right of the Does to have a child or to raise a family. In fact, the Does already have two children. The Adoption Code does not prevent the Does or any couple from having their own children, through their own intimate union with each

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[3] The trial court indicated that Petitioners' allegations did not involve any fundamental rights (App at 23a-25a). The Court of Appeals reached the same conclusion in its opinion, affirming the trial court's opinion (App at 7a-8a).

other. The Does' inability to have further children arises from Mrs. Doe's physical condition, not from anything in the Adoption Code.

Likewise, Mary Roe is not prohibited from having further children, in or out of wedlock, by the Adoption Code.

Thus, whatever fundamental rights may be found here, if any, they are not substantially interfered with by the Adoption Code. Mary Roe will consent to the adoption of her proposed natural child *provided* she is paid to do so, but this adoption consent is subject to important State interests. The interests of the State in prohibiting the payment of money to Mary Roe to induce her to give up her child have been demonstrated above—the prevention of a commercial market for babies, the best interests of the child, a recognition of the child's intrinsic worth, the protection of family and marriage relationships, and the avoidance of conflcting claims of parental rights to custody.

Further interests of the State are in the protection of the mother from duress and overreaching—such as would be potentially involved in the employer/employee relationship as in the proposed transaction or in any case where one party has influence over the other. Another consideration is that the child would already be brought into the world before any of the terms of this type of transaction would be reviewed by the probate court, so that the probate court would be presented with an accomplished event.

The challenged prohibitions in the Adoption Code are sufficiently tailored in that they are applicable only to those persons involved in adoption proceedings and relate only to payments and expenses connected with adoption.

In light of the various State interests advanced by the prohibition against fees for adoption consents, and the absence

of any State interference with fundamental rights, Petitioners' argument that §§ 54 and 69 of the Michigan Adoption Code are unconstitutional should be rejected as being without basis.

IV.

THE PAID-FOR ADOPTION AGREEMENT PROPOSED BY PETITIONERS IS VOID AS BEING AGAINST PUBLIC POLICY.

A discussion of public policy serves to demonstrate the strong State interests which are involved in this area.

The general doctrine that contracts against public policy are void is well summarized in *Mahoney* v *Lincoln Brick Co*, 304 Mich 694, 705; 8 NW2d 883 (1943):

> "'The question whether a contract is against public policy depends upon its purpose and tendency, and not upon the fact that no harm results from it. In other words, all agreements the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void, whether in the particular case the purpose of the agreement is or is not effectuated. For a particular undertaking to be against public policy actual injury need not be shown; it is enough if the potentialities for harm are present.'"

In applying this general rule, the Michigan Supreme Court has held, for example, that marriage broker contracts are void as being against public policy. *Attorney General* v *Marital Endowment Corp*, 257 Mich 691; 242 NW 297 (1932). In that case the Court refused to recognize the handling of marriage promotion contracts as a valid corporate purpose.

The Court recognized the corrosive effect of involving monetary considerations in matrimony at 257 Mich 694-695 as follows:

> ". . . The plan is calculated to promote and to induce on financial grounds marriage of the members. This commerce in marriage is, on the part of the defendant, in practical effect, the promotion of marriage between third persons, its members and others, and tends to marriage through mercenary considerations. This is against public policy. *Antcliff* v *June*, 81 Mich. 477 (10 L.R.A. 621, 21 Am St. Rep. 533).
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> • • •
>
> "'Anything which induces parties to enter into the marriage relation through mercenary considerations strikes at the very foundation of human society, and is necessarily injurious to the community . . . .'"

Another application of the public policy doctrine in the area of marriage is found in the case of *Graham* v *Graham*, 33 F Supp 936, (ED Mich, 1940), wherein an agreement by the wife to support the husband in exchange for his agreement to quit his employment so as to be able to travel with his wife was held to be unenforceable as contrary to public policy. The court relied on the Restatement of the Law of Contracts, § 587, which states:

> "A bargain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal." 33 F Supp at 938.

Certainly the obligations of married persons to mutual fidelity and exclusively in sexual relations are as essential to matrimony as is the obligation of spouses to mutual support.

Another public policy consideration is the fundamental principle that children cannot be bought and sold. This elementary rule is stated in 67A CJS *Parent and Child*, § 16, p 201-202, as follows:

> "Parents have no property rights, in the ordinary sense of that term, in or to their minor children, and, accordingly, a parent's right of control or custody of a minor child is not a property right which may be bargained, sold, or otherwise disposed of." (Footnotes omitted).

15 *Williston on Contracts*, 3d Edition, § 1744A, p 88, states:

> "The sovereign has an interest in a minor child held superior even to that of the parent; hence, there is a public policy against the custody of such a child becoming a subject of barter." (Footnote omitted)

In discussing the related problem of *in vitro* fertilization and implantation of a donor embryo in a second woman, the Executive Director of the Program in Law, Science and Medicine at Yale Law School, opines that contracts for "surrogate gestation" are likely to be held non-enforceable and among her reasons cites the following:

> "In any case, the sale of children is illegal in all states; therefore, any contract by which a host-mother is paid a fee in excess of expenses to gestate the unborn child is likely to be held unenforceable as against public policy. That being the case, the 'foster' or gestating mother would presumably be considered by most courts the natural mother of the child since she and not the donor-mother was willing to go through the inconvenience, discomfort, and dangers of pregnancy and childbirth.

"It is highly unlikely that a judge, faced with a conflict between two women, one of whom has delivered the child and the other of whom 'should' have done so by normal means but who was too busy or disinterested, would resolve the issue of which is the true mother in any way other than by awarding parental status to the host-mother, contracts to the contrary notwithstanding.

"Second, by statute in many states any adoption release executed by the natural mother *before* the birth of a child is invalid. Even in those states that do not declare prenatal surrenders to be absolutely void, courts appear to take a dim view of the validity of an adoption release signed prior to the birth of the child." Holder, *Legal Issues in Pediatrics and Adolescent Medicine* (John Wiley & Sons, 1977) pp 7, 8.

Petitioners often refer to Mary Roe's proposed role as being that of a "surrogate Mother." This jargon serves to gloss over the fact that Mary Roe is the real mother, and Jane Doe would be the substituted (or surrogate) mother if she were permitted to adopt the child.

Petitioners attempt to distinguish their case from baby selling situations by pointing out that John Doe would be the natural father of the child, who is the subject of the monetary transaction. The fallacy in Petitioners' argument is that at the time the contract is entered, John Doe will *not* be related to the child, since the child does not yet exist. Petitioners' calculated, clinical proposal defies comparison with situations where the custody and care of a child must be worked out by the parents, married or unmarried, who had the child in the course of their human non-commercial relationship.

An additional reason from a public policy standpoint why this agreement would be unenforceable is its potential for duress and overreaching through the exploitation of various relationships, such as the employment relationship in this case between Mr. Doe and Mary Roe, and any other situation where one party has some control or authority over the other. See *In Re Allon*, 356 Mich 586; 97 NW2d 744 (1959), wherein the Court upheld the consent of a mother to the adoption of her child where there was no showing of the mother being subject to duress or overreaching.

The proposed contract is likewise unenforceable because the subject matter is likely beyond the Probate Court's competence to adjudicate. For example, if Mary Roe refused to perform, no court would grant specific performance by ordering her to accept artificial insemination, and conceive, bear, and deliver the child as promised. Nor would a court compel John Doe to deliver his semen to a physician and mandate artificial insemination of Mary Roe. Matters of custody and adoption after the birth would be determined by the Probate Court as required by law without respect to the proposed agreement. Thus, specific performance of the agreement would not be available to the parties.

Actions for damages would lead the court into a welter of confusing relationships and claims. For example, if Mary Roe after several unsuccessful attempts to accomplish artificial insemination refused to continue, would she be liable to the Does for the incalculable loss of a child not yet conceived? What liability for damages would Mary Roe have if she deliberately terminated her pregnancy, or refused to give up the child to the custody and adoption of the Does after the birth? In the event of an "imperfect" child, could the Does insist that the agreement was breached, or could Mary Roe require adoption by the Does? What damages or orders could ensue if one of the Does insists on custody and adoption while the

other refuses to perform—due to divorce, separation, abandonment, etc? What if either the Does or Mary Roe remove the child from the state and resist participating in any Michigan litigation concerning the child?

Without specific legislative authorization of this type of transaction setting forth the legal rights and obligations of the various parties and the courts of the State, the proposed transaction violates Michigan public policy as set forth in state law.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Respondent urges this Court to deny the Petition for Certiorari, and to impose costs upon Petitioners' counsel under R 33.7 for expenses which they have caused Respondent to incur.

Respectfully submitted,

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